

BEFORE THE POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

ALPHA INSULATION, INC.

Appellant,

v.

PUGET SOUND AIR POLLUTION
CONTROL AGENCY,

Respondent.

PCHE NO. 88-79

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND ORDER

THIS MATTER, the appeal of a notice and order of civil penalty (No. 6820), assessing \$250 for alleged violations of asbestos removal procedures came on for hearing on September 9, 1988, in Seattle, Washington. Wick Dufford presided for the Board. Judith A. Bendor has reviewed the record.

Benson D. Wong, Attorney at Law, represented appellant. Keith D. McGoffin, Attorney at Law, represented respondent. The proceedings were reported by Gene Barker and Associates.

Witnesses were sworn and testified. Exhibits were admitted and examined. From the testimony heard and exhibits examined, the Board makes the following

FINDINGS OF FACT

I

Alpha Insulation, Incorporated, is a contractor which engages in asbestos removal. On February 18, 1988, the company was carrying out an asbestos removal project in a building being prepared for

1 demolition in the 1300 block on Third Avenue, between University and
2 Union Streets in downtown Seattle, Washington.

3 II

4 Puget Sound Air Pollution Control Agency (PSAPCA) is a municipal
5 corporation with authority to conduct a program of air pollution
6 prevention and control in an area which includes the subject downtown
7 Seattle site. We take notice of PSAPCA's Regulation I, including
8 Article 10 which deals with the removal and encapsulation of asbestos.

9 III

10 On February 18, 1988, PSPACA's inspector observed one of Alpha's
11 workers emerge from 1307 Third Avenue with a clear plastic bag, tied
12 at the top, containing debris. The markings on the bag included,
13 "Danger Contains Asbestos Fibers." The worker carried the bag through
14 an opening near 1321 Third Avenue and went inside. He then reappeared
15 empty-handed.

16 IV

17 Outside the building a wooden-covered walkway had been erected
18 while the job was in progress. This structure separated work areas
19 from the general flow of pedestrian traffic. The worker had to crawl
20 over angled two-by-fours bracing this structure to get to the opening
21 where he entered the building with the bag of debris.

22 The bag hung up briefly as the worker moved past the
23 two-by-fours. The PSAPCA inspector believed the bag had been ripped
24 by this event.

25
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V

After the worker re-emerged, the inspector entered the building through the same opening and found there on the floor, unattended, two clear plastic bags with identical markings warning of asbestos fibers. Both bags were closed at the top. Each was of only a single thickness. The bags contained asbestos debris.

VI

The inspector had no difficulty obtaining access to the space where he found the bags. The area was not behind a locked door. Anyone could have wandered in. Access was via an open aperture from which a loose plastic flap was hung. No asbestos warning signs were observed in the immediate vicinity. Workers not involved in asbestos removal and pedestrians were seen nearby.

VII

After the inspector observed the bags, he brought them to the attention of Alpha's foreman and superintendent. Double bags were brought in and the single bags were placed inside them. The superintendent called a meeting of his crew and delivered a lecture on the necessity of complying with asbestos removal regulations.

VIII

The area inside the building where the inspector observed the unattended bags was used by Alpha as a kind of holding area, where bags of asbestos debris were placed temporarily before being collected and put into a locked space behind for storage prior to disposal.

IX

On March 1, 1988, PSAPCA's inspector mailed two Notices of Violation to Alpha Insulation relating to the observations made on February 18, 1988. The first, No. 25071, asserted a violation of PSAPCA Regulation I, Section 10.04(b)(2)(iii)(C). The second, No. 25072, asserted a violation of PSAPCA Regulation I, Section 10.05(b)(1)(iii). On May 6, 1988, the agency sent Alpha a Notice and Order of Civil Penalty (No. 6820), assessing a fine of \$250 for the two violations alleged in the Notices of Violation.

On June 2, 1988, Alpha Insulation filed an appeal to this Board, the matter becoming our PCHB No. 88-79.

X

Regulation I, Section 10.04(b)(2)(iii)(C) is as follows:

(b) It shall be unlawful for any person to cause or allow the removal or encapsulation of asbestos material or to work on an asbestos project unless:
...(2) The following procedures are employed:
...(iii) Asbestos materials that have been removed or stripped shall be: ... (C) Contained in a controlled area at all times until transported to a waste disposal site.

The definition of a "controlled area," in pertinent part, reads:

An area to which only certified asbestos workers or other authorized persons have access.

XI

Alpha asserts that the entire Third Avenue side of the building was a controlled area, and that asbestos caution tape had been put in place so as to indicate this.

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However, we are persuaded and we find that the area was not so clearly marked and not so restricted as to entry as to effectively limit access only to certified asbestos workers or other authorized persons.

XII

Regulation I, Section 10.05(b)(1)(iii) is as follows:

(b) One of the following disposal methods shall be used during the collection, processing, packaging, transporting or deposition of any asbestos-containing waste material;

(1) Treat all asbestos-containing waste material with water as follows: ... (iii) After wetting, seal all asbestos-containing waste material in leak-tight containers while wet.

XIII

PSAPCA's allegation is that the requirement for sealing asbestos waste in leak-tight containers was violated because one of the bags found by the inspector had been ripped.

However, no one who handled the bag, including the worker who carried it, observed a rip. The photographic evidence admitted does not show a rip. On review of all the testimony, we were not convinced that the bag was, in fact, ripped.

XIV

Alpha Insulation, Inc. has no prior record of violations of PSAPCA's asbestos removal regulations.

1 XV

2 Any Conclusion of Law which is deemed a Finding of Fact is hereby
3 adopted as such.

4 From these Findings of Fact the Board enters the following

5 CONCLUSIONS OF LAW

6 I

7 The Board has jurisdiction over the parties and the subject
8 matter. Chapters 43.21B and 70.94 RCW.

9 II

10 Based on our Findings, we conclude that no violation of
11 Regulation I, Section 10.05(b)(1)(iii) was proven. The bags which
12 were found were not shown to be other than leak-tight.

13 III

14 Based on our Findings, we conclude that the unattended presence
15 of two bags of asbestos waste in the space where they were found by
16 PSAPCA's inspector was a violation of Regulation I, Section
17 10.04(b)(2)(iii)(C). The area was not a controlled area as defined
18 by the regulation.

19 IV

20 The penalty assessed in the instant case, \$250, is less than the
21 statutory maximum of \$1000 per violation per day. RCW 70.04.431(1).

22 However, we are mindful that the civil penalties in question are
23 principally intended not for retribution but for the alteration of
24 behavior. For the single violation found, in light of the record
25

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(6)

1 before us, some degree of mitigation is appropriate.

2 V

3 Any Finding of Fact which is deemed a Conclusion of Law is hereby
4 adopted as such.

5 From these conclusions, the Board enters this

6 ORDER

7 The violation of Section 10.05(b)(1)(iii) is REVERSED. The
8 violation of Section 10.04(b)(2)(iii)(C) is AFFIRMED. The civil
9 penalty is AFFIRMED, but is SUSPENDED provided that appellant does
10 not violate the State Clean Air Act, Chapter 70.94 RCW or PSAPCA
11 Regulations for two years from the date of this Order.

12
13 DONE this 27th day of January, 1989.

14 POLLUTION CONTROL HEARINGS BOARD

15 Wick Dufford

16 WICK DUFFORD, Presiding

17 Judith A. Bendor
18 JUDITH A. BENDOR, Member